Bank Kerjasama Rakyat Malaysia Bhd v Lee Kam Yoong & Ors (Aseambankers (M) Sdn Bhd & Ors, third parties)

HIGH COURT (KUALA LUMPUR) — SUIT NO 22A-731 OF 2011
MOHD ZAWAWI J
21 MAY 2012

Civil Procedure — Affidavits — Contents — Affidavit affirmed by solicitor having conduct of defendants' case — Whether there were disputed questions of fact — Whether there would be conflict of interest if solicitor were called as witness — Whether solicitor had personal knowledge of matters she had sworn to

Civil Procedure — Summary judgment — Application for — Triable issues — Whether defendants had raised triable issues — Whether there was nexus between plaintiff's claims and defendants' claim against third parties — Whether defendants could rely on wrongdoings of third parties for their inability to repay plaintiff — Whether defendants had proven manifest error in certificate of indebtedness

The defendants had entered into a sale and purchase agreement ('the SPA') to purchase a property situated in Petaling Jaya. The plaintiff bank had granted the defendants a RM960,000 Bai Bithman Ajil Facility ('BBA facility') to purchase the property. In order to facilitate the transaction, the parties had entered into a novation agreement and a property sale agreement ('the BBA facility agreements'). Under the terms of the BBA facility agreements, the defendants had to pay the plaintiff monthly installments of RM9,585 before the seventh of each month following the first release of the financing facility. When the defendants had defaulted in their monthly installment payments, the plaintiff had issued a letter of demand. The defendants failed to comply with the letter of demand and this resulted in the plaintiff filing the instant claim for the repayment of the outstanding price under the property sale agreement. In their defence, the defendants pleaded that they had suffered severe financial constraints due to the wrongdoings of four parties named by the defendants ('the third parties'), and that this had affected their ability to repay the plaintiff. The defendants further submitted that there was an issue as to how the outstanding sum of RM712,367.70, as reflected in the certificate of indebtedness, was calculated. In response the plaintiff argued that it should not be involved in the financial crisis between the defendants and the third parties as it was not a party to the dealings between them. The plaintiff contended that the defendants' liability arose from the BBA facility agreements executed between them and that since the issue and validity of these documents and the

utilisation of the facility were not in dispute the defendants were obliged to pay the outstanding sum as evidenced in the certificate of indebtedness. The plaintiff thus submitted there was no genuine issue for trial and proceeded with the present application for summary judgment against the defendants for the sum of RM712,367.70 and costs. The defendants resisted this application and filed an affidavit deposed by the solicitor having conduct of their case.

Held, granting the application for summary judgment with costs fixed at RM3,000:

(1) It is a clear point of law that a solicitor should not depose an affidavit on behalf of the litigant if the facts to be deposed are contentious or disputed questions of fact. In the present case, the court found that there were disputed questions of fact, namely the breaches committed by the third parties and purported payments by the defendants. It is also trite that a deponent is a person who gives evidence by affidavit or affirmation and in affirming the affidavit the solicitor had, in fact, turned into a witness to the matters she averred to in it. In such a case, there would be a conflict of interest if she were called as a witness. Further, she had no personal knowledge of the matters she had sworn to. Notwithstanding the irregularity in the affidavit, this court had proceeded to consider the other affidavit affirmed by the first defendant, which was referred to by the defendants in the present application (see paras 11–18).

(2) The plaintiff was not a party to the transactions entered into by the first defendant and the third parties. The plaintiff's claim against the defendants was for the repayment of the sums outstanding under the BBA facility agreements, while the defendants' claim against the third parties was for damages that arose in contract and tort as a result of dealings between the defendant and the third parties. There was no nexus between the claims. As such, the defendants could not deny their liability to the plaintiff by relying on their failed dealings with the third parties (see paras 20–22).

(3) Under the terms of the BBA facility agreements the parties had agreed to consider a statement of account issued by the plaintiff as conclusive evidence of the defendants' indebtedness. However, the presence of such a term did not prevent the defendants from requiring the court to lift the veil of the document if any manifest error was proven. In the present case, the defendants claimed that the certificate of indebtedness was inaccurate but did not produce any evidence to substantiate this allegation. The onus of proving the inaccuracy of the amount stated in the certificate rested with them but, it was the considered opinion of this court that the defendants had failed to discharge this burden, which rendered the issue as not triable (see paras 24–28).

[Bahasa Malaysia summary

Defendan telah memeterai suatu perjanjian jual beli ('PJB') untuk membeli satu hartanah yang terletak di Petaling Jaya. Bank plaintif telah memberikan defendan RM960,000 kemudahan *Bai Bithman Ajil* ('kemudahan BBA') untuk membeli hartanah tersebut. Dalam usaha untuk memberi kemudahan urus niaga, pihak-pihak telah memeterai perjanjian novasi dan perjanjian jualan hartanah ('perjanjian kemudahan BBA'). Di bawah terma perjanjian kemudahan BBA, defendan terpaksa membayar ansuran bulanan kepada plaintif sebanyak RM9,585 sebelum haribulan ketujuh setiap bulan berikutan pelepasan pertama kemudahan pembiayaan. Apabila defendan mungkir dalam pembayaran ansuran bulanan mereka, plaintif telah mengeluarkan surat tuntutan. Defendan gagal mematuhi surat tuntutan dan ini menyebabkan plaintif memfailkan tuntutan ini bagi pembayaran semula harga yang tertunggak di bawah perjanjian jualan harta. Dalam pembelaan mereka, defendan mengaku bahawa mereka telah mengalami kekangan kewangan yang teruk yang disebabkan oleh salah laku empat pihak yang dinamakan oleh defendan ('pihak ketiga'), dan ini telah menjejaskan keupayaan mereka untuk membayar balik plaintif. Defendan juga berhujah bahawa terdapat isu bagaimana jumlah terkumpul RM712,367,70, seperti yang ditunjukkan dalam sijil keberhutangan, telah dikira. Sebagai balasan, plaintif berhujah bahawa ia tidak perlu terlibat dalam krisis kewangan antara defendan dan pihak ketiga kerana ia bukan pihak kepada urusan antara mereka. Plaintif berhujah bahawa liabiliti defendan timbul daripada perjanjian kemudahan BBA yang disempurnakan antara mereka dan bahawa memandangkan isu dan kesahihan dokumen-dokumen dan penggunaan kemudahan tidak dipertikaikan defendan telah diwajibkan untuk membayar jumlah tertunggak seperti yang dibuktikan dalam sijil keberhutangan. Plaintif mengemukakan bahawa tiada isu asli untuk dibicarakan dan diteruskan dalam tindakan bagi penghakiman terus ini terhadap defendan bagi jumlah RM712,367,70 dan kos. Defendan menentang permohonan ini dan memfailkan afidavit yang diberikan keterangan sumpah oleh peguam yang mengendalikan kes mereka.

Diputuskan, membenarkan permohonan bagi penghakiman terus dengan kos yang ditetapkan pada RM3,000:

(1) Adalah suatu undang-undang yang jelas bahawa seorang peguam tidak perlu memberi keterangan bersumpah afidavit bagi pihak litigan jika fakta-fakta yang hendak dideposkan adalah perbalahan atau soalan fakta yang dipertikaikan. Dalam kes ini, mahkamah mendapati bahawa terdapat pertikaian persoalan fakta, iaitu pelanggaran yang dilakukan oleh pihak ketiga dan pembayaran yang didakwa oleh defendan. Ia juga undang-undang tetap bahawa deponen adalah orang yang memberikan keterangan melalui afidavit atau ikrar dan mengesahkan afidavit peguam cara itu telah, pada hakikatnya, menjadi saksi kepada perkara-perkara yang ditegaskannya. Dalam kes sedemikian, akan wujud konflik

kepentingan jika dia telah dipanggil sebagai saksi. Di samping itu, dia tidak mempunyai pengetahuan peribadi mengenai perkara-perkara yang telah diakuinya. Walaupun ketidakteraturan dalam afidavit tersebut, mahkamah ini telah terus mempertimbangkan afidavit lain yang diakui oleh defendan pertama, yang telah dirujuk oleh defendan dalam permohonan ini (lihat perenggan11–18).

(2) Plaintif bukan pihak kepada transaksi yang dibuat oleh defendan pertama dan pihak ketiga. Tuntutan plaintif terhadap defendan adalah untuk pembayaran balik jumlah tertunggak tersebut di bawah perjanjian kemudahan BBA, manakala tuntutan defendan terhadap pihak ketiga adalah untuk kerosakan yang timbul dalam kontrak dan tort akibat urusan antara defendan dan pihak ketiga tersebut. Tiada pertalian antara tuntutan. Oleh itu, defendan tidak dapat menafikan liabiliti mereka terhadap plaintif dengan bergantung kepada kegagalan urusan mereka dengan pihak ketiga (lihat perenggan 20–22).

(3) Di bawah terma perjanjian kemudahan BBA pihak-pihak telah bersetuju untuk mempertimbangkan penyata akaun yang dikeluarkan oleh plaintif sebagai bukti konklusif keberhutangan defendan. Walau bagaimanapun, kewujudan tempoh sedemikian tidak menghalang defendan daripada menghendaki mahkamah untuk menyingkap tabir dokumen tersebut jika terdapat sebarang kesilapan yang nyata terbukti. Dalam kes ini, defendan mendakwa bahawa sijil keberhutangan adalah tidak tepat tetapi tidak mengemukakan apa-apa bukti untuk menyokong dakwaan ini. Beban membuktikan ketidaktepatan amaun yang dinyatakan dalam perakuan itu berada dengan mereka tetapi, ia adalah pendapat mahkamah ini bahawa defendan telah gagal untuk melepaskan beban ini, yang mana menjadikan isu ini tidak boleh dibicarakan (lihat perenggan 24–28).]

Notes

For a case on contents, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 352.
For cases on application for summary judgement, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7895–7945.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ 627, SC (refd)
Barclays Bank v Tom [1923] 1 KB 221, CA (refd)
CIMB Bank Bhd v Dresdner Kleinwort Ltd [2008] 4 SLR 543, CA (refd)
Dobbs v National Bank of Australasia Ltd (1953) 53 CLR 643, HC (refd)
Malayan Banking Bhd v Charterefield Corp Sdn Bhd [2001] 3 MLJ 160; [2001] 6 CLJ 407, HC (refd)
Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors [1986] 1 MLJ 315; [1985] 1 CLJ 181 (refd)

Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd [1986] 1 MLJ 348; [1985] 2 CLJ 97; [1985] CLJ (Rep) 760 (refd)
Shencourt Sdn Bhd v AseamBankers Malaysia Bhd Suit No D2–22–665 of 2005, HC (refd)
Wan Othman bin Datuk Wan Yusof v Kewangan Utama (M) Bhd [1993] 2 CLJ 572, HC (refd)

Legislation referred to

Rules of the High Court 1980 O 14, O 41 r 5(1), (2)

Irdawati Abd Aziz (Noor Amran) for the plaintiff.
Victoria Martin (Victoria Martin Chambers & Sree) for the defendants.

Mohd Zawawi J:

INTRODUCTION

[1] This was an application for summary judgment by the plaintiff against the defendants for a sum of RM712,367.70 as at 29 July 2011 and costs at solicitor-client basis pursuant to O 14 of the Rules of the High Court 1980 ('RHC').

[2] The application had been granted with costs fixed at RM3,000.

FACTS

[3] By a sale and purchase agreement dated 12 February 1996 ('the principal agreement'), the defendants had purchased a property known as No 7, Jalan S/13 I, Seksyen 5, 47000 Petaling Jaya, Selangor Darul Ehsan erected on a land identified as Grant No PN 6531, Lot No 506, Seksyen 5, Bandar Petaling Jaya, District of Petaling, Selangor Darul Ehsan ('the property') from ones Thuraidas a/l M Thuraisingham and Pushpakumari a/p Velayudhan Nair ('the vendor') at RM1,220,000.

[4] Upon application by the defendants, the plaintiff had granted RM960,000 *al-Bai Bithaman Ajil* facility ('BBA facility') to finance the purchase of the above property. This was evidenced by the issuance and acceptance of a letter of offer dated 6 February 1996.

[5] In order to facilitate the transaction, the parties had entered into the following agreements:

(a) novation agreement dated 4 April 1996 ('novation agreement') where the plaintiff had become a party to the principal agreement in place of the defendants;

(b) property sale agreement dated 4 May 1996 ('PSA') where the plaintiff had then sold the property to the defendants at RM2,300,313.60 ('the selling price') payable by 239 equal monthly instalments of RM9,585 and a final instalment of RM9,498.60, on or before the seventh day of the month following the first release or disbursement of the financing facility; and

(c) memorandum of charge dated 8 May 1996 as a security for the BBA Facility.

[6] The cause of action against the defendants arose when they had failed to pay the monthly instalments as per PSA resulting Messrs Noor Amran, the plaintiff's solicitors, to issue a letter of demand dated 14 July 2011. Unfortunately, the defendants had still failed to comply with the demand.

ARGUMENTS BY THE DEFENDANTS

[7] The affidavits of the defendants in opposition to the application and their bundle of authorities disclose the following facts:

(a) the first defendant was a managing director in a company namely, Shencourt Sdn Bhd ('the company');

(b) the company had undertaken a project known as the Galaxy Ampang Shopping Complex ('the project');

(c) the project had been financed by a syndicated loan by the first named third party ('Aseambankers (M) Bhd') with the participation of the second, third and fourth named third parties;

(d) the defendants had failed to pay the monthly instalments to the plaintiff on the alleged ground that the first defendant had to rescue the project which had suffered severe financial constraint due to the third parties' breaches in contract, tort and as bankers to the company and the project;

(e) in view of the above breaches, Zainun Ali J (as she then was) via judgment dated 6 May 2009 in the case *Shencourt Sdn Bhd v AseamBankers Malaysia Bhd* Suit No D2–22–665 of 2005 ('the civil suit'), had ordered, inter alia, Aseambankers (M) Bhd to pay damages to the first defendant for the loss suffered as a result of the sale of his movable and immovable properties to raise funds for the project;

(f) according to the defendants, this fact showed that the first defendant's financial condition had been adversely affected by the third parties' wrongdoings. Therefore, it had greatly affected their liability to pay the plaintiff ('liability of the third parties'); and

(g) the defendants had made payment up to 22 March 2011 and not just up to 2009 as claimed by the plaintiff. Therefore, there was an issue of how the sum of RM712,367.70 was calculated ('certificate of indebtedness').

[8] In response to the above arguments, the plaintiff argued that it should not be involved in the financial crisis between the first defendant, the company and the third parties as it was not a party to the project. According to the plaintiff, the defendants' liability under BBA facility arose from the BBA facility agreements executed between them. The issue of its validity and utilisation of the facility were not in dispute. Therefore, they were obliged to pay the outstanding as evidenced in the certificate of indebtedness (exh ZO5), upon which the defendants failed to prove any manifest error.

FINDINGS OF THE COURT

[9] In an application for summary judgment, this court's main concern is on the question of whether the plaintiff has met its onus of proving that there is no genuine issue for trial. In this present case, the defendants submitted that the plaintiff did not discharge the threshold.

[10] Before delving further into the issues raised, this court would like to highlight the fact that the affidavit affirmed on 2 February 2012 ('encl 16') and filed in resisting this application is the affidavit deposed by a solicitor namely, Ms Victoria Martin, having conduct of the defendants' case. To my mind, it is procedurally and substantially wrong.

[11] The law is clear. A solicitor should not depose an affidavit on behalf of the litigant if the facts to be deposed are contentious or disputed question of facts.

[12] In *Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348; [1985] 2 CLJ 97; [1985] CLJ (Rep) 760, Edgar Joseph Jr J (as he then was) had this to say:

> With respect, in matters where disputed questions of facts are involved, it is for the parties and not their solicitors to affirm affidavits relating thereto.

[13] In *Million Group Credit Sdn Bhd v Lee Shoo Khoon* [1986] 1 MLJ 315; [1985] 1 CLJ 181, M Shankar J (as he then was) said:

> A second point which needs to be emphasised is that the practice of solicitors themselves filing contentious affidavits in pending applications should be discouraged. The parties are the litigants and it is they who should be giving evidence.

[14] The question here is what is a contentious affidavit? A

[15] According to Ramly Ali JC (as he then was) in *Malayan Banking Bhd v Charterefield Corp Sdn Bhd* [2001] 3 MLJ 360; [2001] 6 CLJ 407, a contentious affidavit is an affidavit that contains contentious or disputed question of facts. It is not sufficient that the solicitor must have been authorised by her client to depose the affidavit per se. He said: B

> A solicitor may depose an affidavit on behalf of the litigant if three conditions were fulfilled. The first condition is that the facts to be deposed must not be contentious or disputed question of facts. C
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> …
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> The second condition was that the facts to be deposed must be from the deponent's knowledge.
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> The third condition to be fulfilled was that the deponent must have been authorised by the plaintiff to depose the affidavit. D

[16] In the case before me, in the light of the contents of encl 16, I am of the considered view that there were disputed question of facts. Enclosure 16 is premised on two main facts: (1) breaches of the third parties in the Civil Suit and (2) purported payment made by the defendants. E

[17] It is trite that a deponent is a person who gives evidence by affidavit or affirmation. In affirming the affidavit, Ms Victoria had, in fact, turned herself to be a witness to the matters she averred to. In such a case, there would be conflict of interest if she were to be called as a witness. Furthermore, she has no personal knowledge on the matters she sworn to (see O 41 r 5(1) and (2) of the RHC and *Wan Othman bin Datuk Wan Yusof v Kewangan Utama (M) Bhd* [1993] 2 CLJ 572). F G

[18] Notwithstanding the irregularity in the affidavit, this court had proceeded to consider the other affidavit affirmed by the first defendant on 3 January 2012 ('encl 12') which was, in fact, filed in reply to the third parties' application for striking out ('encl 11') and referred by the defendants in this present application. H

LIABILITY OF THE THIRD PARTIES

I

[19] I am in entire agreement with the submissions by learned counsel for the plaintiff on this point.

[20] It is pertinent to note that the plaintiff is not a party to the transaction entered into by the first defendant, Shencourt Sdn Bhd and the third parties. Therefore, the plaintiff is devoid of any legal significance or any legal consequence that arises between the parties. For me, the plaintiff should not be expected to know any problem that took place amongst them. This is because the third parties' case is not inextricably linked to this present action.

[21] Chao Hick Tin JA in *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR 543 had this to say:

> [t]he real test to determine whether a third-party action should be heard together with the main action is not that of connection alone but whether they are inextricably linked and the third-party action is an integral and inseparable part of the main action.

[22] The plaintiff's claim is for the repayment of the outstanding selling price under PSA while the defendants' claim against the third parties is for damages arose from the third parties' breaches in contract, tort and as bankers to the company and the project. In my considered view, there is clearly no nexus between the claims. The duty is cast on the defendants in this case to ensure that they would pay the selling price as per PSA. If they had failed to do so (which they had admitted), they could not rely on the failure of the third parties for not repaying the outstanding to deny their liability.

[23] In *Barclays Bank v Tom* [1923] 1 KB 221, Scrutton LJ had this to say:

> [N]ow I think it is important to keep clearly in mind what the third party procedure is. A plaintiff has a claim against a defendant. The defendant thinks if he is liable he has a claim over against a third party. With that matter between the defendant and the third party the plaintiff has obviously nothing to do. He is not concerned with the question whether the defendant has a remedy against somebody else. His remedy is against the defendant.

CERTIFICATE OF INDEBTEDNESS

[24] According to cl 23 of the PSA, the parties had agreed to consider a statement of account issued by the plaintiff as conclusive evidence against the defendants as to their indebtedness.

[25] In *Dobbs v National Bank of Australasia Ltd* (1953) 53 CLR 643, the Australian Court made the following observation:

> The bank could recover without the production of a certificate if, by ordinary legal evidence, it proved the actual indebtedness of the customer. But the (conclusive evidence) clause, if valid, enables the bank by producing a certificate to dispense with such proof. It means that for the purpose of fixing the liability of a surety, the customer's indebtedness may be ascertained conclusively by a certificate. But the manifest object of the clause was to provide a ready means of establishing the existence and amount of the guaranteed debt and avoiding an inquiry upon legal evidence into the debits going to make up the indebtedness.

[26] The respective clause relevant in this case reads:

> A statement of account in writing stating the amount payable by the customer under this agreement and duly certified by the manager of the bank or any authorised person thereof shall in the absence of manifest error be conclusive evidence that such amount is in fact due and payable by the customer.

[27] Based on the above term, although there is a statement prepared by the plaintiff (see exh ZO5), the presence of such clause does not prevent the defendants to require the court to lift the veil of the document if there is any manifest error proven. Hence, the onus is rested on the defendants to prove the inaccuracy of the amount stated in the certificate which, in my considered opinion, the defendants had failed in discharging the burden.

[28] In this application, the defendants had asserted that the plaintiff in its statement of claim had claimed that the defendants had made no payment for 74 months ie 2009 where their records showed that the last payment made was on 22 March 2011 For this, it is hard for me to consider the allegation when there is no such statement ever pleaded by the plaintiff in the document and neither in any affidavit at the first place. Furthermore, I find no evidence put forth by the defendants to substantiate the allegation. Merely by putting such assertion or dispute which is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents is neither here nor there and this court has a duty to reject such assertion or denial, thereby rendering the issue as not triable (see *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] MLJ 400; [1992] 1 CLJ 627).

CONCLUSION

[29] For the reasons stated above, I had allowed the plaintiff's application with costs at RM3,000.

Application for summary judgment granted with costs fixed at RM3,000.

Reported by Kohila Nesan